

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHARON DAVIS)	
Claimant)	
VS.)	
)	
SANDPIPER BAY HEALTH INC.)	Docket No. 251,923
Respondent)	
AND)	
)	
KANSAS HEALTH CARE ASSOCIATION WICHITA)	
Insurance Carrier)	

ORDER

Respondent appeals the August 13, 2001 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded a 77.5 percent permanent partial general body disability. The Appeals Board (Board) held oral argument on March 8, 2002.

APPEARANCES

Claimant appeared by her attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

The only issue before the Board for its consideration is the nature and extent of claimant's disability. The parties have stipulated to a 7.5 percent whole body functional impairment based upon a compromise of the opinions of Edward J. Prostic, M.D., and

Frederick Ray Smith, D.O. This leaves only the issue of claimant's entitlement to a work disability in dispute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified to award claimant a 7.5 percent whole body functional impairment pursuant to the stipulations of the parties. Claimant is denied any work disability for the reasons stated below.

Claimant, a CNA, began working for respondent in August of 1999. Her duties involved caring for residents, which included lifting and transferring residents, dressing residents and pushing wheelchairs. Claimant's job duties regularly required that she lift between 100 and 150 pounds, although most of this lifting was done with assistance.

On January 30, 2000, while walking on an icy sidewalk, claimant slipped and fell, injuring her low back. She was taken to the emergency room at Wesley Medical Center. She was then referred to Dr. Morris Seligman and Dr. Bruce Buhr for follow-up treatment. She was returned to limited duty on February 8, 2000, with restrictions from Dr. Seligman prohibiting lifting over 10 pounds. Claimant was also to avoid repetitive bending and lifting, and was to use her left hand only as tolerated. Her left hand lifting was limited to 5 pounds. Dr. Seligman specifically requested claimant not lift or transfer patients.

Claimant returned to work with respondent and met with Janine Ruiz, staff development coordinator for respondent. Ms. Ruiz and claimant talked about the list of duties claimant could perform within the restrictions placed upon her by Dr. Seligman. A list of job duties that claimant was able to perform within her restrictions was prepared. This list was reviewed and signed by both Ms. Ruiz and claimant. Claimant was advised if she had any problem with any tasks, she was to stop performing that activity and make the charge nurse aware of her difficulties. Claimant was to perform only those duties which she could do within her restrictions.

Claimant was also advised to alternate her activities so that she was not performing the same activities continuously. If a specific activity caused her pain, she was to stop performing the activity and change to one which did not cause her pain.

On February 8, 2000, claimant began performing light-duty jobs, but was forced to leave early, alleging that her back pain was too severe for her to continue working. On February 9, claimant was instructed to answer telephones, but left early, advising that it was too painful for her to sit for two hours answering the phones. On the job list signed by

claimant and Ms. Ruiz was a designation that claimant would answer the phones from 5:00 p.m. to 7:00 p.m.

From the period when claimant returned to work up to the second week of March, claimant never completed an 8-hour shift while working for respondent. There was a period between March 9 and March 21 when claimant was off work, undergoing additional tests. The MRI, which was performed at Dr. Seligman's request, indicated claimant had a small disc herniation at L3-4, with a disc bulge at L4-5. Claimant was returned to continued light-duty work on March 22, 2000.

Claimant's history is significant in that she suffers from sickle cell disease, avascular necrosis in her left hip and hypothyroid. These conditions have been present for many years, and claimant had been receiving medical attention from Dr. Dennis Moore, Sr., for these conditions for a number of years. However, prior to the January 30, 2000 incident, Dr. Moore never placed any weight lifting limitations on claimant and never put any specific restrictions against standing or walking on claimant's job duties.

Claimant was referred for treatment by Dr. Seligman to osteopathic physician Frederick Ray Smith, D.O. Dr. Smith was employed at Wesley Medical Center as a board certified physical medicine and rehabilitation specialist. He first examined claimant on March 21, 2000. Claimant had already completed a series of physical therapy treatments prior to Dr. Smith's examination.

Dr. Smith performed a physical examination, which failed to detect any sign of neurological damage or deficit from the fall. His main findings were tenderness to palpation over the right lumbosacral area and the medial border of her right scapula. Her bending was self limited due to pain to about 50 percent of normal.

Dr. Smith diagnosed a thoracolumbar strain, with continued complaints of pain in the right hip and a past history of right leg contusion. Dr. Smith again saw claimant on April 12, 2000, at which time her forward bending had improved to almost 90 degrees while sitting. Her backward bending was still limited to about 50 percent of normal. Claimant had tightness in her hips and hamstrings, which Dr. Smith felt was most likely due to the avascular necrosis.

Dr. Smith felt claimant was at maximum medical improvement on April 12, 2000, and released her with specific work restrictions, including no lifting above 15 pounds, with occasional bending and lifting, and standing and walking as tolerated. He felt claimant had suffered a 5 percent whole person impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Smith testified that the restrictions he placed on claimant were temporary and he felt she would return to her

pre-injury status within six months. However, when Dr. Smith saw claimant on September 13, 2000, he continued the restrictions.

Dr. Smith testified that he intended for claimant to perform more sit-down duties than standing and walking duties, but he also wanted her to stand and walk as needed and to perform some of her duties while standing and walking.

Claimant was referred to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination at the request of her attorney. The examination occurred on June 16, 2000. Dr. Prostic reviewed x-rays and the MRI tests, finding that claimant had a small disc herniation at L3-4, with a disc bulge at L4-5. He further diagnosed the avascular necrosis in claimant's left hip, with some indication of avascular necrosis, although not as severe, in the right hip. Dr. Prostic felt that the restrictions placed upon claimant by Dr. Smith would be appropriate. He would additionally advise that she avoid repetitious or forceful pushing or pulling, or the use of vibratory equipment. Dr. Prostic felt his restrictions and those of Dr. Smith should be permanent.

Both Dr. Smith and Dr. Prostic ultimately diagnosed claimant as having a lumbar strain. Dr. Prostic stated that essentially claimant had a strain/sprain of her spine superimposed upon a lot of preexisting degenerative disease. He testified that clinically this was not a herniation of the disc, but more a severe back sprain syndrome.

Dr. Prostic felt claimant capable of returning to work in a light to medium work category, but stated it would be hard to imagine claimant performing any heavy duty labor jobs.

Claimant continued working for respondent with the light-duty restrictions through April 5, 2000. But after returning to work, claimant was found on numerous occasions sitting down, not performing the duties that she was assigned. Claimant was counseled on several occasions by Ms. Ruiz regarding her obligation to stay busy. She was told that if her back was bothering her performing one activity, she should change that activity to another that did not bother her. Ms. Ruiz found claimant on several occasions simply standing or sitting and performing no job duties. Generally, when claimant was found doing this, claimant would either state that she was going on break or could not continue working, and she would leave work early.

On March 22, 2000, claimant was found sitting in the sunroom. Claimant had not checked out with the charge nurse and was sitting at the table performing no work duties. Claimant was again counseled about the need to stay busy and work within her restrictions. On several occasions, claimant was instructed to answer telephones between 5:00 p.m. and 7:00 p.m., which was part of the agreed upon list from the February 8 meeting between her and Ms. Ruiz. Several times claimant replied that she was simply in too much

pain to perform those duties and would leave early. Claimant also testified that when she was found sitting in the sunroom, she had only been there a minute and was within a few feet of the nurse's station and could have heard any call lights from her position in the sunroom.

Claimant was instructed to complete an assignment sheet on her work days to track what duties she was performing within her restrictions. On April 4, 2000, claimant failed to return the assignment sheet to the charge nurse. Claimant indicated that she did turn the duty list in, but no list was ever found. Claimant also failed to check out with the duty nurse when she left the unit on that date, but again claimant testified that information was inaccurate because she alleges she did check with Pat Niedens, the charge nurse, on that day.

As a result of the April 4 incident and other prior incidents, claimant's employment was terminated on April 5, 2000.

After her termination, claimant began receiving unemployment benefits. She continued to receive those benefits for several months. Claimant contacted the Kansas Department of Social and Rehabilitation Services and requested vocational rehabilitation counseling. She met with Penny Radke, a rehabilitation counselor for the State of Kansas, on August 10, 2000. During the interview with claimant, Ms. Radke concluded that claimant's primary problems were the sickle cell anemia, the avascular necrosis in her hips, and some unexplained problem with her shoulder. Claimant did discuss the work injury to her back.

Claimant underwent vocational assessment testing on September 19, 20 and 21. During this testing, claimant was required to sit from 9:00 a.m. to 4:00 p.m., with a one-hour break, three consecutive days. Claimant was physically capable of concluding the tests over the three-day period without apparent problem.

Ms. Radke found claimant able to concentrate and also found she did not fatigue easily, thereby determining that she was a good candidate for training.

She last met with claimant on October 18, 2000. At that time, claimant was placed on a waiting list. While undergoing the testing and being on the waiting list, claimant ceased any attempt to search for any type of employment. Ms. Radke indicated that she would encourage claimant to continue looking for work during both the training and the waiting period, but that it was not a requirement. She did not, however, expect claimant to simply give up on her job search. She would encourage claimant to continue looking for new employment.

Claimant testified that she would be willing to return to work for respondent so long as they offered her a sit-down job only. However, no doctor who treated claimant recommended that she work only a sit-down job.

In workers' compensation litigation, it is claimant's obligation to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

The parties have stipulated to a 7.5 percent general body functional impairment. The only issue before the Board is claimant's entitlement to a work disability under K.S.A. 1999 Supp. 44-510e, which defines permanent partial general disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

However, that statute must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Foulk considered the 1988 version of K.S.A. 44-510e, which contained a presumption of no work disability if the employee was engaging in any work for wages equal to 90 percent or more of the average weekly wage. The Court of Appeals, in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), held that for the purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability, rather than actual wages, when the worker fails to make a good faith effort to find or maintain appropriate employment after recovering from the injury. Gadberry v. R.L. Polk & Co., 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. Copeland, *supra*, at 320.

In this instance, respondent offered claimant accommodated employment within the restrictions placed upon her by both Dr. Smith and Dr. Seligman. Claimant, however, for

a several-week period failed to complete even a single 8-hour shift. Claimant protested that she was unable to sit from 5:00 p.m. to 7:00 p.m. and answer the telephone because it was too painful. However, after claimant left her employment with respondent, she spent three consecutive days, sitting and testing with the Department of Social and Rehabilitation Services without complaint.

Claimant further testified that she would be willing to return to work for respondent so long as they offered her a sit-down job, even after refusing on several occasions to sit and answer the phone for two hours.

The accommodated employment which was offered claimant was within the restrictions of all of the doctors who examined her. Claimant ultimately lost her employment with respondent after she was found on numerous occasions standing or sitting away from her duty station and not performing any of her work duties.

The Board finds pursuant to the rationale set forth in Foult, *supra*, that claimant failed to put forth a good effort to maintain her employment with respondent in the accommodated position provided for her.

Pursuant to K.S.A. 1999 Supp. 44-510e, the Board imputes to claimant the wages she was earning with respondent which would limit claimant to her stipulated functional impairment of 7.5 percent to the body as a whole.

The Board, therefore, finds that the Award of the Administrative Law Judge granting claimant a work disability in this matter should be reversed and claimant is limited to a 7.5 percent permanent partial general body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 13, 2001, should be, and is hereby, modified and claimant, Sharon Davis, is granted an award against respondent, Sandpiper Bay Health Inc., and its insurance carrier, Kansas Health Care Association Wichita, for an injury occurring on January 30, 2000, and based upon an average weekly wage of \$571.41, for a 7.5 percent permanent partial general body disability. Claimant is awarded 1.71 weeks temporary total disability compensation at the rate of \$380.95 per week totaling \$651.42, followed by 31.13 weeks permanent partial general body disability at the rate of \$380.95 totaling \$11,858.97, for a total award of \$12,510.39. As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director